BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CARL J. HILL, SR. Claimant	)	
V.	)	
PENNY'S CONCRETE, INC. Respondent	)	Docket No. 1,064,362
AND	)	
CINCINNATI INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

All parties requested review of the April 17, 2015, Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on August 4, 2015. Jeffrey K. Cooper of Topeka, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant sustained his burden of proving the July 28, 2011, accident was the prevailing factor in causing impairment of function to his left shoulder and his development of post traumatic stress disorder (PTSD). Giving equal weight to the rating opinions, the ALJ determined claimant sustained a 7.5 percent functional impairment to the left upper extremity at the level of the shoulder, equivalent to a 4.5 percent functional impairment to the body as a whole. Again giving equal weight to the provided opinions, the ALJ found claimant sustained an 8.5 percent functional impairment to the body as a whole related to his PTSD, for a total combined 13 percent functional impairment to the body as a whole. The ALJ determined claimant proved he is entitled to a 37.7 percent permanent partial general (work) disability, based on a 23.7 percent task loss and a 51.7 percent wage loss. Finally, the ALJ found claimant is not entitled to future medical treatment.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues claimant is not entitled to work disability benefits. Respondent maintains claimant failed to prove he sustained in excess of 7.5 percent permanent partial functional impairment, and there is no evidence of a causal connection between claimant's wage loss and his injury by accident. Respondent argues claimant is entitled only to an award of compensation for a 6.5 percent permanent partial functional impairment to the whole body.

Claimant argues the more credible evidence proves he is entitled to a work disability award of 57.4 percent, inclusive of a 24 percent whole body functional impairment, and is entitled to future medical treatment. Claimant indicated "the decision of ALJ Moore on impairment disability should be affirmed but reversed on the issue of medical treatment."[1]

The issues for the Board's review are:

1. What is the nature and extent of claimant's functional impairment?

2. Is claimant entitled to an award based upon a work disability?

3. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant began employment with respondent in March 2011 as a concrete truck driver, earning an average weekly wage (AWW) of $867.45 including fringe benefits. On July 28, 2011, claimant was driving the concrete truck when a tire blew, causing the truck to roll over. Claimant sustained injuries to his left shoulder and arm. Claimant also developed psychological issues shortly after the accident. Claimant testified he began experiencing nightmares and panic attacks when startled by loud noises.

Immediately following the accident, claimant was taken by ambulance to Abilene Hospital, where he was examined, treated, and released. Claimant next began treatment with Dr. James McAtee, a board certified orthopedic surgeon, on August 3, 2011. Dr. McAtee diagnosed claimant with a left shoulder rotator cuff tear and performed a left shoulder arthroscopy with rotator cuff repair and subacromial decompression on September 1, 2011. Claimant underwent physical therapy and continued to follow-up with Dr. McAtee until his full release with no restrictions on June 14, 2012.

Prior to his release, claimant returned to work full-time at respondent. Claimant stated he had difficulty lifting the steel chutes on the concrete truck, and respondent

[1] Claimant's Brief (filed June 16, 2015) at 20.

accommodated him by replacing the steel chutes with lighter aluminum chutes. Claimant testified he worked for approximately six weeks before he was terminated due to lack of work. Claimant received unemployment benefits for an unspecified amount of time. The record is also unclear regarding claimant's last day worked at respondent.

Dr. McAtee provided claimant with a cortisone injection to his left acromioclavicular (AC) joint on May 17, 2012. Dr. McAtee testified claimant's AC joint was not involved in the previous surgery, but his AC joint probably became inflamed and irritated as a result of use during recovery and physical therapy. Claimant had positive impingement signs during this visit, and Dr. McAtee recommended claimant undergo another MRI of the left shoulder to evaluate the integrity of the rotator cuff repair. A repeat MRI was not done, and Dr. McAtee did not personally see claimant after May 17, 2012.

Instead, claimant's final examination was conducted by Lindsay Pierce, PA-C, on June 14, 2012. During this visit, claimant reported having intermittent pain and popping in his left shoulder, though the pain was improving. He was not taking pain medication. He further indicated he had returned to respondent full-time with no restrictions. Following a physical examination, Ms. Pierce reported claimant had normal strength, no atrophy and negative impingement signs related to his left shoulder. Claimant's strength was tested manually; a functional capacity evaluation was not conducted. Based upon Ms. Pierce's findings, Dr. McAtee found claimant to be at maximum medical improvement (MMI) and released him with no restrictions. Dr. McAtee testified improvement following rotator cuff repair surgery takes several months, and claimant seemed to be functioning at a fairly normal level at the time of his release.

In a letter dated July 2, 2012, Dr. McAtee determined claimant sustained a 5 percent impairment to the left upper extremity at the level of the shoulder based on the AMA *Guides*.[2] Dr. McAtee testified his rating was primarily based on claimant's strength and range of motion as reported by Ms. Pierce on June 14, 2012. Dr. McAtee stated he considered these results when he issued no permanent restrictions.

Claimant testified he applied for numerous jobs after leaving respondent, but was only contacted for two interviews. He testified he did not seek truck driver positions because he continued having problems driving following the accident, although no restrictions were placed on him that would prevent his driving. Claimant accepted a position as a tire and lube technician at Wal-Mart in January 2013 working 38 to 39 hours per week with no restrictions. As of November 28, 2014, claimant earned $9.85 per hour,

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

with an AWW of $419.02 exclusive of fringe benefits.[3] As of January 1, 2015, claimant earned $10.35 per hour in addition to receiving fringe benefits.[4]

Dr. Pedro Murati, a board certified independent medical examiner, evaluated claimant on April 9, 2013, at claimant's counsel's request. Claimant complained of pain and a prickling sensation in his left shoulder, pain in his left biceps, and difficulty lifting with his left arm. Dr. Murati reviewed claimant's history, medical records, and performed a physical examination. The physical examination indicated claimant had a decrease in sensation in his left axillary distribution and a decrease in strength in the left shoulder, secondary to pain. Claimant had mild left parascapular atrophy, in addition to positive signs of impingement and mild glenohumeral crepitus of his left shoulder. Claimant further exhibited decreased range of motion in his left shoulder than was recorded on June 14, 2012. Dr. Murati testified these results are not uncommon for one who has had a rotator cuff repair. He further stated a loss of range of motion following post-surgery recovery is to be expected, as patients usually do well during recovery and then regress after returning home. Dr. Murati allowed it was possible some loss of range of motion could be attributed to claimant's post-injury job duties, but he had no knowledge of claimant's post-injury employment.

Dr. Murati diagnosed claimant as status post subacromial decompression and mini open deltoid sparing rotator cuff repair. He imposed permanent restrictions on claimant, limited to the left shoulder:

> That in an eight-hour day, no crawling or ladders, no above shoulder level work with the left, no lift, carry, push, pull greater than 35 pounds, and that only occasional, 20 pounds frequently, ten pounds constantly, and no reach more than 24 inches away from the body on the left.[5]

Dr. Murati noted, within all reasonable medical probability, claimant's July 28, 2011, work-related accident resulted in, and is the prevailing factor of, his current diagnoses. Dr. Murati recommended annual follow-up examinations related to claimant's left upper extremity "just in case something needs to be done."[6]

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[3] See R.H. Trans., Resp. Ex. A.

[4] The value of claimant's insurance benefits is not in evidence, and no wage statement was submitted reflecting claimant's wage increase in 2015.

[5] Murati Depo. at 11.

[6] *Id*. at 9.

Using the AMA *Guides*, Dr. Murati provided a rating opinion:

> According to the [AMA *Guides*], for the loss of sensation of the axillary distribution, using tables 11 and 15, this claimant receives 3% upper extremity impairment. For the loss of range of motion of the left shoulder, using figures 38, 41 and 44, this claimant receives 7% left upper extremity impairment. For the left shoulder status post subacromial decompression, using table 27, this claimant receives 10% left upper extremity impairment. These impairments combine for 19% left upper extremity impairment.[7]

A 19 percent left upper extremity impairment translates to an 11 percent impairment of the body as a whole.

Dr. Murati acknowledged the partial resection procedure performed on claimant's left shoulder is not included in Table 27 of the AMA *Guides*. He testified:

> [Claimant] didn't have a total shoulder resection; he had only a partial amputation of the acromion process, that is a resection arthroplasty. Resection means to take out. He did take that bone out. For some reason, the writers of the [AMA *Guides*] fail to mention this, I mean they include a distal clavicle excision, which you essentially are taking pretty much about the same amount of bone out, so that's why I add, and I have always for many, many years added a small amount, ten percent, to a resection arthroplasty.[8]

Dr. McAtee testified claimant's surgical procedures are not among those found in Table 27. Dr. McAtee explained he did not perform an arthroplasty because the bone removal during subacromial decompression does not involve a joint. Dr. McAtee could not say if the AMA *Guides* allow for a rating regarding bone removal of the acromion process.

Vocational consultant Doug Lindahl interviewed claimant on July 26, 2013, at the request of claimant's counsel. Mr. Lindahl noted claimant was 52 years of age at the time of the interview with associate degrees in both general studies and auto mechanics, earned while claimant was in the Army at Fort Riley. Mr. Lindahl testified claimant was working as a service technician at Wal-Mart at that time, earning $9.36 per hour, or $374.40 per week. Claimant was not receiving fringe benefits. Mr. Lindahl explained he received wage information directly from claimant and had no reason to question claimant's accuracy. Mr. Lindahl reviewed claimant's area labor market for automotive technician wages; he did not consider wages earned by area truck drivers or diesel mechanics. Mr. Lindahl concluded claimant, "through his job seeking, accessed what was available to him, so whatever he's currently earning is what's available and, therefore, is his earnings

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[7] *Id.*, Ex. 2 at 3.

[8] Murati Depo. at 26.

capacity."[9] He agreed claimant's subsequent wage increase and addition of fringe benefits indicate claimant's wages and wage capabilities are higher than reflected in the report.

Mr. Lindahl identified 19 unduplicated job tasks claimant performed as both a motor vehicle inspector and diesel mechanic in the 5 years prior to his work-related accident. Mr. Lindahl reviewed the reports of Drs. Murati and McAtee. Mr. Lindahl acknowledged Dr. McAtee imposed no permanent restrictions, indicating claimant retains the capacity to earn the same wages earned at the time of the work-related accident.

Dr. Murati reviewed the task list generated by Mr. Lindahl. Of the 19 unduplicated tasks on the list, Dr. Murati opined claimant could no longer perform 12 for a 63 percent task loss. Dr. Murati testified claimant could perform Task A-5, spraying truck surfaces, if he used his right arm for overhead handling. Claimant is right-hand dominant, and Dr. Murati agreed a sprayer is probably operated with the dominant hand. Dr. Murati eliminated Task B-3, performing safety checks, under the assumption it required frequent reaching beyond 24 inches. Dr. Murati testified the report does not indicate the length of reach required or whether both arms are necessary for task completion. The inability to perform 10 of 19 tasks reflects a task loss of 52.6 percent.[10]

Vocational consultant Steve Benjamin interviewed claimant on January 7, 2015, at respondent's request. Mr. Benjamin reviewed claimant's educational and vocational history, which included specialized light-wheeled and heavy-wheeled mechanics training claimant received while in the Army. He noted claimant possessed a current CDL license. Mr. Benjamin gave claimant a simple intelligence test known as the Wonderlic Personnel Test. Claimant scored in the low average range, but Mr. Benjamin opined this should not hinder claimant's ability to perform or find work.

Mr. Benjamin incorporated the 2014 Kansas Wage Survey in his review of claimant's current labor market, finding the average wage for concrete truck drivers to be $752.40 per 40-hour work week and the average wage for automobile mechanics to be $699.60 per 40-hour work week. Mr. Benjamin reviewed claimant's wage statements from both respondent and Wal-Mart, noting claimant was earning $862.68 per week prior to the accident and $417.43 per week at the time of the interview. Mr. Benjamin opined claimant could return to work at respondent at comparable wages based upon the lack of permanent restrictions imposed by Dr. McAtee. The average wage of similar positions in claimant's area compared to claimant's pre-injury earnings reflect a wage loss of 12.8 percent. Mr. Benjamin stated claimant could expect his wages to increase if he remains in his position with Wal-Mart, potentially reaching the area average of $699.60. Mr.

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[9] Lindahl Depo. at 17.

[10] The ALJ calculated a resulting task loss of 47.4 percent in his Award. (ALJ Award [filed Apr. 17, 2015] at 8).

Benjamin testified claimant's current position is reasonable within the restrictions of Dr. Murati.

Mr. Benjamin generated a list consisting of 24 unduplicated tasks performed by claimant in the 5 years preceding the work accident. Dr. McAtee reviewed Mr. Benjamin's list and opined claimant could perform all tasks, reflecting a task loss of 0 percent.

Beginning shortly after the July 2011 accident and continuing until early 2012, claimant underwent psychological treatment with clinical social worker Charles Drees, LSCSW, at Pawnee Mental Health (Pawnee). Claimant testified he learned deep breathing and relaxation techniques to help cope with his nightmares and panic attacks, which he continues to use as needed. Claimant was not prescribed medication for his psychological complaints.

Clinical psychologist Robert Barnett, Ph.D., evaluated claimant on April 23, 2013, at claimant's counsel's request. Claimant provided personal, medical and vocational histories and reported his current status. Claimant indicated he experienced nightmares once every three months, panic episodes twice per week following loud noises, flashbacks to the accident triggered by loud noises, and became worried while driving. During the panic episodes, in addition to the flashbacks, claimant described having "shortness of breath, shakiness, his heart pounding, feeling like he is having a heart attack, having to sit down and feeling disoriented."[11] Claimant copes with these episodes by employing the breathing and relaxation techniques learned at Pawnee.

Dr. Barnett performed a basic physical examination and conducted multiple tests on claimant. Claimant scored below average in reading recognition, which is considered functionally illiterate and consistent with having a learning disorder. Further test scores indicated claimant's anxiety levels were elevated and that he was truthful with his responses. Dr. Barnett diagnosed claimant with moderate PTSD and a learning disorder not otherwise specified by history. He explained the basis of his PTSD diagnosis:

> Well [claimant] endorsed the three basic legs of this diagnosis which are having a trauma of some kind that either affected him directly or they say affect his integrity. They have nightmare about this and flashbacks as well. The flashbacks – I have a lot of people tell me they have flashbacks when I talk to them. And that's not what a flashback is. A flashback is a reexperiencing of the trauma.[12]

Dr. Barnett noted claimant did not appear to be cognitively limited in a manner which would interfere with employment. Dr. Barnett recommended claimant receive mental health treatment from a licensed mental health professional and a medical consultation

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[11] Barnett Depo., Ex. 2 at 7.

[12] Barnett Depo. at 12.

from a psychiatrist. Dr. Barnett expected claimant to demonstrate moderate to significant improvement with treatment, and deterioration of claimant's condition without treatment.

Additional psychological treatment was authorized by the court in August 2013, and claimant returned to Pawnee for three sessions before treatment was mutually ended in May 2014. Claimant testified he received the same treatment as previously received at Pawnee in 2012. Claimant agreed the Pawnee records indicated claimant's symptoms were improved with better sleeping and less anxiety. Claimant disagreed with Pawnee records indicating he was no longer startled by loud noises.[13] Claimant testified treatment was mutually ended because he was informed nothing more could be done for his psychological condition. Claimant was not prescribed medication.

Claimant returned, at his counsel's request, to Dr. Barnett on July 9, 2014. Dr. Barnett reported claimant's condition had worsened since 2013 in that his panic episodes were more prominent. Dr. Barnett noted claimant indicated he improved after additional treatment from Pawnee, but the improvement did not persist. After conducting essentially the same examination as in 2013, Dr. Barnett concluded claimant suffered from moderate PTSD with panic episodes and a learning disorder not otherwise specified by history. Dr. Barnett noted claimant did not appear to be cognitively limited in a manner which would interfere with employment. He again recommended claimant receive additional psychological treatment and did not believe claimant to be at MMI. Dr. Barnett imposed no permanent restrictions.

Dr. Barnett provided a rating opinion:

> Using the 4th Edition of the AMA Guides, specifically Chapter 14, Mental and Behavioral Disorders, as well as the table entitled "Classification of Impairments Due to Mental and Behavioral Disorders," I would place [claimant] in Class 2: Mild Impairment. This classification implies: "Impairment levels are compatible with *most* useful functioning. Extrapolating this classification to the 2nd Edition of the AMA Guides, specifically Chapter 12, Mental and Behavioral Disorders, as well as Table 1 – "Evaluation of Psychiatric Impairment," I would place [claimant] in Class of Impairment 2, which implies a percentage of impairment to be 10% to 20%. I would further estimate the percentage of impairment to be 15%.[14]

Psychologist Patrick Caffrey, Ph.D., examined claimant on January 5, 2015, at respondent's request. Claimant complained of waking up to loud noises, middle-of-night insomnia 2 to 3 times per week, nightmares occurring about once per month, and panic attacks with hyperventilation, rapid heartbeat, and hot/cold sensations. Claimant's previous panic attack treatment did not include medication. Dr. Caffrey reviewed

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[13] See R.H. Trans. at 50.

[14] Barnett Depo., Ex. 3 at 8.

claimant's history, medical records and current status and performed an examination including multiple tests. Dr. Caffrey concluded claimant suffered from PTSD, resolving, specific learning disorder with impairment in word reading, and specific learning disorder with impairment in written expression (spelling). Dr. Caffrey testified claimant's cognitive-deficit diagnoses were not related to the work accident. He indicated claimant was fully functional and independent for activities of daily living.

Dr. Caffrey testified PTSD has a "delayed expression" qualifier according to the DSM-5.[15] He explained "in the future the person could have the troubling symptoms reoccur or be triggered by something maybe in terms of a sentry cue a person gets, either something they see, something they hear, it could be something they smell that could bring back some of those symptoms."[16] Dr. Caffrey noted claimant completed PTSD treatment with good results, but may require future treatment related to any onset of delayed expression. Dr. Caffrey opined claimant's July 28, 2011, work-related accident was the prevailing factor causing his PTSD. He determined claimant to be at MMI psychologically and imposed no permanent restrictions.

In his February 2, 2015, report, Dr. Caffrey provided a rating opinion. He wrote:

> [Claimant] has had a good outcome from the treatment for the [PTSD]. He is performing well in his occupational setting as well as for basic and advanced activities of daily living. He has returned to his baseline leisure interests. Based on his current level of functioning, however, he has an estimated 2% emotional or behavioral impairment based on the 4th Edition of the AMA guides. This attributable to the "delayed expression" qualifier, which is unique to [PTSD].[17]

During his deposition, Dr. Caffrey testified he believed he used the 4th edition of the AMA *Guides* in assessing his rating opinion, but upon further review acknowledged that edition does not provide percentages for mental and behavioral impairments. Dr. Caffrey allowed he may have instead used the 2nd edition of the AMA *Guides*, which does provide percentages. The 4th edition of the AMA *Guides* provides four categories in assessing the severity of mental impairments: activities of daily living, social functioning, concentration, persistence and pace, and deterioration or decompensation in work or work-like settings. Dr. Caffrey indicated claimant had no deficits or limitations in any of these four categories. Dr. Caffrey testified claimant reported functioning well at his current job and did not mention any need for using the coping techniques learned at Pawnee.

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[15] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.).

[16] Caffrey Depo. at 25.

[17] *Id*., Ex. 2 at 9-10.

Claimant denied suffering any psychological or left upper extremity issues prior to the work-related accident of July 28, 2011. Claimant currently works as an auto technician at Wal-Mart for 38 to 39 hours per week, earning $10.35 per hour with fringe benefits. He performs all job duties with no accommodations, though he testified to difficulties with some overhead work and lifting up to 50 pounds due to strength loss and pain in his left arm. Claimant explained, "I still have popping and grinding in my left shoulder, and I have, like, pains like somebody is sticking me with pins and needles, and loss of control of my arm."[18] Claimant has permission from his current employer to temporarily leave the shop on the occasions loud noises trigger a panic episode. He continues to have anxiety problems while driving and suffers occasional nightmares.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states, in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-510e(a)(2)(C) states:

> An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
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> > (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7 ½ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
> >
> > (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

[18] R.H. Trans. at 15-16.

> In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

K.S.A. 2011 Supp. 44-510h(e) provides, in relevant part:

> It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Psychological disorders can be compensable if they are directly traceable to a claimant's physical injury.[19] The standard for whether a psychological injury, or traumatic neurosis, is compensable under the Workers Compensation Act is that the psychological injury must be directly traceable to a compensable physical injury.[20] Under the Act applicable to this claim, claimant must also prove the accident is the prevailing factor in causing the psychological injury.[21]

ANALYSIS

1. What is the nature and extent of claimant's functional impairment?

The ALJ averaged the 5 percent impairment rating provided by Dr. McAtee and 10 percent of Dr. Murati's 19 percent impairment rating, and found claimant has a 7.5 percent functional impairment to the left shoulder. The ALJ converted the 7.5 percent upper

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[19] See *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994); *Love v. McDonald's Restaurant,* 13 Kan. App. 2d 397, Syl. ¶ 1, 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

[20] See *Gleason v. Samaritan Home*, 260 Kan. 970, 926 P.2d 1349 (1996).

[21] See *Scott v. State of Kansas,* No. 1,069,374, 2014 WL 7521746, at *4 (Kan. WCAB Dec. 4, 2014); *Heyen v. City of Wichita*, No. 1,064,079, 2013 WL 2455722 (Kan. WCAB May 29, 2013); *Jordan-Cain v. State of Kansas*, No. 1,058,565, 2012 WL 3279504 (Kan. WCAB July 12, 2012).

extremity rating to 4.5 percent of the whole body based upon the AMA *Guides*.

The ALJ did not find credible that part of Dr. Murati's rating where he used the AMA *Guides'* 10 percent rating for resection arthroplasty as a benchmark to give claimant a rating for a subacromial decompression, which he indicated was a partial resection. However we term claimant's surgical procedure, it is not listed in Table 27 of the AMA *Guides*, which contains ratings for various other surgeries. The lack of a listed rating for such procedure does not mean a corresponding rating does not exist. A health care provider may properly rate a condition based on his or her judgment where the condition is not accounted for in the AMA *Guides*.[22]

Dr. Murati is analogizing a rating for claimant's surgery using a reference in the AMA *Guides*. Whether a rating for subacromial decompression or partial resection is listed in Table 27 is legally irrelevant. Dr. Murati did not indicate claimant had one of the procedures listed in Table 27. Because the procedure is not listed in the AMA *Guides*, Dr. Murati could simply have devised a rating on his own, but his extrapolating a rating by referencing a chart in the AMA *Guides* seems more grounded and less arbitrary than pulling a number out of thin air. Dr. McAtee's 5 percent rating should be averaged with Dr. Murati's full 19 percent rating to arrive at an 12 percent impairment for claimant's surgically-operated left shoulder. Pursuant to the AMA *Guides*, this converts to a 7 percent whole body impairment.

The ALJ found both ratings provided for PTSD to be credible. The ALJ found claimant to suffer an 8.5 percent functional impairment for PTSD, based upon Dr. Caffery's assessment of a 2 percent whole body impairment and Dr. Barnett's assessment of a 15 percent whole body impairment.

Claimant suffers a 15.5 percent whole body impairment resulting from his July 28, 2011, work-related accident.

2. Is claimant entitled to an award based upon a work disability?

The ALJ awarded a 37.7 percent work disability, based upon findings of a 51.7 percent wage loss and a 23.7 task loss. The Board disagrees. K.S.A. 2011 Supp. 44-510e(a)(2)(C)(ii) requires claimant to experience at least a 10 percent wage loss directly attributable to the work injury, and not to other causes or factors, in order to be entitled to a work disability. Claimant testified he worked driving a truck for respondent for approximately six weeks after his accident before he was terminated due to lack of work. Claimant agreed that no one at respondent ever told him he could not work there because

[22] See K.S.A. 44-510e; *Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 202 P.3d 108 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009), *publication denied* Nov. 5, 2010, and *Kinser v. Topeka Tree Care, Inc.*, No. 1,014,332, 2006 WL 2632002 (Kan. WCAB Aug. 1, 2006).

of his injury. Prior to the lay off, respondent accommodated claimant's position by replacing the steel chutes with lighter aluminum chutes. Dr. McAtee opined claimant had no restrictions, and claimant was apparently able to work for respondent within Dr. Murati's restrictions. Claimant's testimony that he was laid off because of a lack of work is uncontroverted.

The ALJ's Award indicated claimant was "laid off, ostensibly for lack of business."[23] The Award further stated:

> No employee of respondent testified to the reason Claimant was let go. While Dr. McAtee imposed no permanent work restrictions, Claimant continued to complain of pain while performing his duties as a concrete truck driver, and Respondent attempted to accommodate him by replacing the steel concrete chutes on his truck with lighter aluminum ones. In the absence of any evidence or testimony from Respondent as to the reason Claimant was terminated, the inference that Claimant was continuing to have pain, and might require further accommodation and/or treatment provides the causal link between Claimant's injury and his separation from employment. Claimant has sustained his burden of proof of entitlement to a permanent partial general work disability.[24]

Claimant has the burden of proving a post-injury wage loss of at least 10 percent directly attributable to the work injury and not other causes or factors. There is no such evidence. There is no rule that a claimant proves a separation of employment is due to an injury if he or she has pain and might need further accommodation or treatment, and respondent does not put on evidence why the claimant was laid off. There is no rule that a claimant being laid off automatically results in the claimant having wage loss due to his or her injury. Stated another way, there is no presumption a wage loss is due to an injury.

There is no need for respondent to prove a claimant was laid off for reasons apart from his or her injury where a claimant has failed to present evidence he or she has a post-injury wage loss of at least 10 percent directly attributable to the injury. There are many reasons a worker, injured or not, would be laid off. The ALJ's decision reduces claimant's burden of proof to a nullity[25] and essentially returns the work disability formula to something akin to the pre-May 15, 2011, statutory changes and *Bergstrom*,[26] in which the reason for wage loss was irrelevant.

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[23] ALJ Award at 6.

[24] *Id.* at 13-14.

[25] Most injured workers have continuing pain and might need accommodations and might need more medical treatment. Such facts do not mean a claimant was laid off due to his or her work injury.

[26] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

Based upon claimant's testimony, the Board finds claimant failed to meet his burden of proving a post-injury wage loss of at least 10 percent which is directly attributable to the work injury and not other causes or factors. Claimant is not entitled to work disability.

3. Is claimant entitled to future medical treatment?

The ALJ found claimant failed to overcome the statutory presumption that respondent's obligation to provide medical treatment terminated when claimant achieved MMI. The Board disagrees. Claimant testified he continues to have popping, grinding and pain in his left shoulder.[27] In his final clinical note, dated June 14, 2012, Dr. McAtee advised claimant to seek treatment at an emergency room if his symptoms worsened. Dr. McAtee also recommended another MRI, which was never performed. Dr. Murati recommended claimant schedule yearly follow up examinations in case of complications. The ALJ dismissed Dr. Murati's treatment recommendations as advice he always gives. There is no evidence in the record that Dr. Murati makes this recommendation for every patient he examines. Dr. Murati's opinion in this regard is uncontroverted.

With regard to whether claimant needs future treatment for PTSD, the Board agrees with the ALJ. Dr. Caffrey, whose practice involves treating patients, thought the need for future counseling was unlikely. The recommendations made by Dr. Barnett, who does not treat patients, are contrary to claimant's own testimony that his condition has improved. The medical evidence does not support a finding that it is more probably true than not that additional medical treatment will be necessary.

CONCLUSION

Claimant sustained a 15.5 percent whole body impairment resulting from his July 28, 2011, work-related accident. Claimant failed to meet the burden of proving a 10 percent wage loss directly attributable to his work injury. Claimant is entitled to future medical treatment upon application to the Director for his left shoulder. Claimant failed to prove that it is more probably true than not that additional medical treatment will be necessary for his PTSD.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated April 17, 2015, is modified.

The claimant is entitled to 37.71 weeks of temporary total disability compensation at the rate of $555.00 per week in the sum of $20,929.05 plus 60.80 weeks of permanent partial disability compensation at the rate of $555.00 per week in the sum of $33,744.00

[27] See R.H. Trans. at 15-16.

for a total due and owing of $54,673.05, all of which is due and owing and ordered to be paid in one lump sum less amounts previously paid.

Claimant is entitled to future medical treatment upon application to the Director for his left shoulder.

IT IS SO ORDERED.

Dated this _____ day of September, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Jeffrey K. Cooper, Attorney for Claimant
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Bruce E. Moore, Administrative Law Judge